

a

ELECTION COMMISSION, MALAYSIA

v.

ABDUL FATAH HARON

SUPREME COURT, KUALA LUMPUR

MOHD. AZMI SCJ

b

HASHIM YEOP SANI SCJ

WAN HAMZAH SCJ

[CIVIL APPEAL NO. 161 OF 1987]

28 JULY 1987

c

ELECTIONS: Election petition - Challenging validity of election of candidate who won - Whether duly elected or returned - Candidate died subsequently.

ELECTIONS: Election Commission - Announcement of nomination date for by-election - Whether can lawfully call for nominations before finalisation of election petition.

CIVIL PROCEDURE: Injunction - To restrain Election Commission from calling for nominations - Whether Court has jurisdiction to entertain application for injunction.

d

This was an appeal in reference to an election petition. The respondent lost the election held on 3 August 1986. He filed an election petition in the High Court, Kota Bharu, challenging the validity of the election of the other candidate one Zakaria Bin Botok ("Zakaria"). Before the election petition was heard Zakaria passed away on 31 March 1987.

e

The Chairman of the Election Commission announced on 6 April 1987 that nomination for the Bukit Tuku by-election as a result of Zakaria's death would be held on 18 April 1987, and that if there was a contest polling would be held on 27 April 1987.

f

On 13 April 1987 the respondent applied *ex parte* for an interim injunction to restrain the Election Commission from calling for nominations on 18 April 1987 with a view to holding the said by-election before finalisation of the election petition. On 23 April 1987 the appellant applied to discharge the interim injunction but it was refused by the learned Judge. Hence this appeal.

Held:*g*

[1] It is not that the Court has no jurisdiction to hear an application of this nature but that the Court must bear in mind that the Election Commission was performing its constitutional functions under the law.

h

[2] The law has also prescribed the period during which a by-election should be held. Article XLVI (5) of the Constitution of the State of Kelantan requires that a casual vacancy shall be filled within 60 days from the date on which it occurs. Therefore it is a clear intention of the legislature that the by-election should be concluded according to the time frame prescribed.

[3] Any controversial matter arising out of the election should be brought up only after the election is over so that the election proceeding may not be unduly hampered or protracted. If a person is dissatisfied with the election he should bring his complaint before an election Judge by way of an election petition. Such complaint should not be made an issue before any Court while the election is in progress.

i

[4] Therefore it is not a question of the Court having no jurisdiction but that the Court should decline to exercise its jurisdiction so as not to hinder the democratic process.

[Appeal allowed with costs.]

Legislation referred to:

Constitution of the State of Kelantan, art. XLVI (5)

Election Offences Act 1954, s. 33(1)

Federal Constitution, art. 113, (1)

For the appellant - K.N. Segara, SFC

For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT**Hashim Yeop Sani SCJ:**

Abdul Fatah bin Haji Haron, the respondent in this appeal was one of the two candidates in the Kelantan state election for the state constituency of Bukit Tuku held on 3 August 1986. He lost the election. On 1 October 1986 he filed an election petition in the Kota Bharu High Court *vide* Kota Bharu Election Petition No. 33-1-86 challenging the validity of the election of the other candidate, one Zakaria bin Botok. In the petition he claimed that the said Zakaria bin Botok was not duly elected or returned and that he was the one who was duly elected and ought to have been returned. The hearing of the said election petition was fixed in April 1987 but was postponed because the said Zakaria bin Botok passed away on 31 March 1987. On 2 April 1987 the secretary to the Dewan Negeri Kelantan wrote to the secretary to the Election Commission informing the Commission of the death of the said Zakaria bin Botok.

Article 113(1) of the Federal Constitution enjoins the Election Commission *inter alia* to conduct elections to the legislative assemblies of the states. Article XLVI(5) of the Constitution of Kelantan provides that a casual vacancy in the legislative assembly of the state shall be filled within sixty days from the date on which it occurs. The Chairman of the Election Commission announced on 6 April 1987 that nomination for the Bukit Tuku by-election as a result of the death of the said Zakaria bin Botok would be held on 18 April 1987 and that if there was a contest polling would be held on 27 April 1987.

On 13 April 1987 the respondent filed a civil suit against the Election Commission in the High Court in Kuala Lumpur asking for a declaration that the Election Commission Cannot lawfully call for nominations on 18 April 1987 with a view to holding a by-election for the Bukit Tuku constituency before finalisation of the Kota Bharu Election Petition No. 33-1-86. On the same day the respondent made an *ex parte* application by summons-in- chambers for an interim injunction to restrain the Election Commission from calling for nominations on 18 April 1987 with a view to holding the said by-election. The learned Judge granted the application with liberty to apply.

On 23 April 1987 the Election Commission applied to discharge the interim injunction but the application was refused by the learned Judge. Hence the appeal. Since there is no written judgment by the learned Judge we do not know for certain on what basis or principles the interim injunction was granted. On 20 May 1987 we allowed the appeal and discharged the injunction.

Many grounds of appeal were submitted on behalf of the Election Commission. For the purpose of this appeal we need only consider one as being the most cogent and this is the question of jurisdiction.

It was submitted on behalf of the appellant that there was no jurisdiction for the Court to entertain the application of the respondent because the Election Commission was exercising its constitutional functions under Part VIII of the Federal Constitution relating to conduct of elections. It was also submitted that this Court had decided the same in previous appeals -

- a* SCCA No. 358 of 1985, SCCA No. 359 of 1985 and SCCA No.360 of 1985. The three appeals originated from three summons-in-chambers consolidated asking for a number of orders including one that sought for an injunction to restrain the Election Commission and their servants, agents or otherwise from issuing a writ of by-election and holding, conducting or continuing with any by-election in a constituency in the State of Sabah. All the applications were dismissed by the learned Judge and this Court dismissed the appeals on 7 November 1985.
- b* In its oral judgment this Court recognises two important aspects of the matter before it then. Firstly, it recognises that the relief sought in the Court below was discretionary. Because it was an exercise of discretion the appellate Court leans against inter-ferring with the decision of the lower Court unless it can be shown that the Judge had exercised his discretion on wrong principles of law. Secondly, it recognises the constitutional functions of the Election Commission which are clearly set out in Art. 113 of the Federal Constitution to conduct elections to the House of Representatives and the legislative assemblies of the States.
- c*

d It is not that the Court has no jurisdiction to hear an application of this nature but that the Court must bear in mind that the Election Commission was performing its constitutional functions under the law. The election process is prescribed in the Constitution. The Election Commission is given a vital role in this democratic process. The Constitution also provides that any matter which has the effect of vitiating an election should be brought up before an appropriate forum. Article 118 of the Federal Constitution reads:

No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

Section 33(1) of the Election Offences Act 1954 states:

- e* Every election petition shall be tried by the Chief Justice or by a Judge of any High Court nominated by the Chief Justice for the purpose:

Provided that the Chief Justice shall not nominate a Judge of a High Court of which he is not Chief Justice without consulting the Chief Justice of that High Court.

- f* Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an election Judge and nowhere else.

- g* The law has also prescribed the period during which a by-election should be held. Article XLVI(5) of the constitution of the state of Kelantan requires that a casual vacancy shall be filled within sixty days from the date on which it occurs. Therefore it is a clear intention of the legislature that the by-election should be concluded according to the time frame prescribed. Any controversial matter arising out of the election should be brought up only after the election is over so that the election proceeding may not be unduly hampered or protracted. If a person is dissatisfied with the election he should bring his complaint before an election Judge by way of an election petition. Such complaint should not be made an issue before any Court while the election is in progress. Therefore it is not a question of the Court having no jurisdiction but that the Court should decline to exercise its jurisdiction so as not to hinder the democratic process.
- h*

On the above grounds we allowed the appeal with costs to the appellant here and below.

Also found at [1987] 2 CLJ 193